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December 11, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: CS Docket No. 98-201

Dear Ms. Salas:

On behalf of Wilmington Telecasters, Inc., there are transmitted herewith an original and four (4) copies of its Comments in the above-referenced rule making proceeding.

In accordance with the procedures established in the Notice of Proposed Rule Making, a diskette copy is being submitted to Don Fowler. Also, a diskette copy is being provided to the Commission's contractor.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,

James A. Koerner

James A. Koerner,
Counsel for
Wilmington Telecasters, Inc.

cc: Mr. Don Fowler (w/diskette)
ITS, Inc. (w/diskette)
Hon. Robinson O. Everett

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	CS Docket No. 98-201
to Unserved Households for	)	RM No. 9335
Purposes of the Satellite Home	)	RM No. 9345
Viewer Act	)	
	)	
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	

TO: The Commission

COMMENTS OF WILMINGTON TELECASTERS, INC.

Wilmington Telecasters, Inc., licensee of Television Station WSFX ("WSFX"), Wilmington, North Carolina, by its attorneys, hereby submits its Comments in the above-captioned proceeding, in response to the Notice of Proposed Rule Making ("NPRM") released November 17, 1998.

WSFX operates on Channel 26, and is affiliated with the Fox Television Network. The station began operating (as WJKA) in 1984. Wilmington Telecasters, Inc. is the original owner of this station, having operated it for fourteen (14) years. The station has vigorously asserted its rights regarding cable carriage, non-duplication protection, etc., recognizing that, in a market the size of Wilmington, each and every viewer counts – significantly.

Very shortly, WSFX will be forced to build what is essentially a new station to convert to a digital operation. The past and future capital expenditures, as well as the day-to-day operating expenses of WSFX are dependent upon advertising dollars. In turn, the number of advertising dollars depends upon the size of the viewing audience WSFX can deliver to advertisers.

This proceeding was commenced at the behest of EchoStar and NRTC, as the result of court decisions adverse to their interests. Highlights of the lawsuit are detailed in the NPRM. Essentially, two federal district courts found that certain Direct Broadcast Satellite ("DBS") distributors were delivering programming to subscribers in violation of the copyright laws. As noted in the NPRM, the Satellite Home Viewer Act ("SHVA") provides satellite carriers with a compulsory copyright license for the delivery of television network signals if certain conditions are met. These conditions were carefully crafted by Congress to strike a balance between the network affiliates' need to keep their audiences in order to continue the provision of local television service, and making national network television programming available to every household desiring it.

The requirements for the compulsory license are neither complex nor onerous. They seek only to insure that a potential DBS subscriber is an "unserved household." This is defined as one which cannot receive a local affiliate's over-the-air signal of at least Grade B intensity with a conventional rooftop receiving antenna, and which has not subscribed to the local cable system carrying the affiliate within the 90 days prior to subscribing to the DBS service.

In the decisions prompting the petitions for rule making, the court found that certain DBS providers had been and continued to sign up and to provide service to households without paying any attention – except possibly lip service – to whether they were, in fact, "unserved households." With respect to the availability of over-the-air service, at most, potential subscribers were asked whether their local network signal was acceptable. Virtually no attempts were made to ascertain actual strength of the signal or even to explain what the signal strength should be. Undoubtedly, no attempts were made to determine whether the household had subscribed to the local cable system within the past 90 days.

As a result of their failure to comply with the details of the SHVA, DBS providers signed up thousands, or even millions, of customers who were not "unserved households" and thus not eligible for service under the compulsory license. Now that courts of competent jurisdiction have ordered them to comply with the law, EchoStar and NRTC are asking the FCC to save them from the consequences of having to do so. This is reminiscent of the tale about the lad who killed his father and mother, and then asked the court to show mercy because he was an orphan.

It is clear that the Commission cannot alter the SHVA. Accordingly, the Commission proposes, in this proceeding, to interpret the definition of an "unserved household" by playing with the "signal of Grade B intensity" requirement.

In the statute, Congress specifically stated that the signal strength was to be Grade B, as defined by the FCC. Admittedly, Congress did not further define Grade B, such as by specifying a particular dBu level. However, Grade B intensity was already defined in the FCC rules, and there was no need for Congress to repeat the definition. While the FCC undoubtedly has the ability, under the Administrative Procedures Act, to change its rules from time to time, such changes must be accompanied by a rational explanation.

If the Commission were to re-define the intensity of a Grade B signal in this proceeding, what would be the effect, for example, on the definition of a qualified local noncommercial educational television station in Section 76.55(b)? What would be the effect on other rules that rely on Grade B signal intensity, such as cross-ownership? To say that a Grade B signal has one meaning in one case and a different meaning in another is nothing short of Alice in Wonderland. The Commission's suggestion that it already does so (NPRM para. 22) is ridiculous. The "traditional Grade B contour scheme" versus the "Longley-Rice" model is only an example of two methods for predicting the location of a Grade B contour, not different definitions of it.

That the usual Grade B construct is intended to predict signal intensity over wide areas is irrelevant. Congress, in the SHVA, clearly knew the definition was to be applied to individual households. Congress could have provided that an unserved household had to be beyond a station's predicted Grade B contour. Instead, Congress would allow a

household, even within a station's primary service contour, to be unserved if, for whatever reason, a signal of Grade B intensity could not be received with a standard rooftop receiving antenna.

Even if the Commission did develop a better or more accurate method for predicting Grade B contours, the present SHVA does not permit the substitution of a predicted Grade B signal for an actual Grade B signal. The relief the DBS providers seek lies with the Congress, not with the FCC. Congress created the SHVA, and Congress can re-create it after hearing all of the arguments pro and con.

The use of some predictive method as a presumption is clearly beneficial since it would largely eliminate the need to take measurements at each and every household. This is already done in the case of Netlink and PrimeStar under voluntary agreements. With the present "loser pays" requirement in the event the presumption is challenged, both broadcast stations and DBS providers have incentive to be extremely selective in making such challenges. The Commission might recommend that the SHVA be amended to provide for such presumptions. The present wording of the Act simply does not provide for them.

Since Congress did not specify any particular methodology for measuring the signal intensity at an individual household, and the Commission's Rules regarding measurement, i.e., Section 73.686, are cumbersome in these circumstances, the Commission could specify a simpler methodology keeping in mind the intent of the compulsory license provisions. As noted above, the license was meant only to permit

each household to receive network programming, but without destroying the base of a local station's viewership, and with it any possibility of continued local programming.

In defining a measurement methodology, the Commission cannot vary from the statutory requirement of a conventional outdoor rooftop receiving antenna. While there may be disparities in height depending on whether the household is a house trailer or a three-story mansion, a requirement that the antenna be a set number of feet above the roof of the particular household should be acceptable. Keep in mind that the measurement methodology would normally only be used in the case of a challenge at a given household, and, in any case, is to be household-specific.

Requiring that the antenna be oriented to receive an optimum signal is only common sense. In many areas, television stations have located their transmitting sites to minimize the need for re-orienting the antenna when changing channels. Since rotors are not particularly expensive, the need for one should not be considered a hardship.

No measurement methodology should take into account the number of television receivers the household may have. In order to serve numerous receivers, amplifying equipment would be needed whether the receiving antenna is "conventional" or a "dish."

In light of the fact that a measurement methodology has already been worked out, to the apparent satisfaction of the broadcast industry and at least part of the DBS industry, that should, at a minimum, provide a good starting place.

There is no question that the ultimate solution to the copyright issue is "local into local" provisions, with must carry and retransmission consent provisions. If DBS and

cable are to compete with each other, the rules should be the same for both. DBS providers should not have fewer responsibilities, and local stations should not suffer because of DBS expansion.

Finally, there remains the question about the thousands, or even millions, of households that presently receive distant network signals because their DBS providers ignored the SHVA requirements. Were it not for an agreement among the adversarial parties, the consequences of the injunction would already have happened. That agreement only postponed the effective date to February 28, 1999.

The emotional appeal advanced by NRTC and EchoStar -- that all these households will "lose" service -- should not cloud the real issue. No DBS subscribers need lose access to network programming. If they qualify as an "unserved household," the DBS provider can continue to provide the service. If they do not qualify, a conventional rooftop antenna will provide the service. NRTC, EchoStar, and those supporting their positions, are overlooking the fact that the consumers they now seek to protect were sold a "bill of goods" by the violators at the outset. Perhaps they should consider providing the conventional rooftop antennas. The Commission is powerless to prevent enforcement of the copyright laws.

Essentially, the Commission's options, other than recommending statutory changes, are to re-define Grade B signal intensity and/or to establish a method for measuring a Grade B signal at a particular single location. To do the former would impact other rules as well, and possibly would require a re-definition of Grade A and City Grade signal intensity as well. Establishment of a measurement methodology is a sound

idea, provided it is consistent with the spirit of the SHVA and with the industry agreements already in place.

Respectfully submitted,

WILMINGTON TELECASTERS, INC.

By: _____
James A. Koerner
Its Attorney

December 11, 1998

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